Harvest Communications, Inc. *and* Piera De Michele. Case 2–CA–27852

April 26, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On November 9, 1995, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a supporting brief and a reply brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order[3] as modified.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent argues that employee De Michele was discharged solely because she misrepresented her authority to act in the name of the Respondent, as allegedly demonstrated by the testimony of insurance agent Linda Bermas. Bermas testified that De Michele told her that Respondent's president, Shapiro, wanted the price quote for the group dental insurance. In our view, the Respondent has isolated one statement that constituted only a small part of the conversations between De Michele and Bermas that spanned several telephone conversations between them concerning the dental plan. We note that Bermas answered similar questions in a manner indicating that she had simply assumed that De Michele was calling at Shapiro's request. We find, on examination of the entire record concerning the telephone conversations between Bermas and De Michele, that De Michele did not misrepresent her authority to act in the name of the Respondent, especially in light of the fact that the judge credited De Michele's testimony that she did not misrepresent herself and that he cast doubt on Bermas' credibility.

The judge stated erroneously that De Michele received the insurance agent Bermas' price quote for the dental coverage by overnight mail rather than that she received it by messenger. This inadvertent error does not affect our result.

We find merit in the General Counsel's exceptions to the judge's failure to include an expunction remedy, and we shall modify the Order accordingly.

[2] In adopting the judge's conclusions that the Respondent violated Sec. 8(a)(1) of the Act by discharging De Michele for her protected concerted activity and that she did not lose the protection of the Act, we find it unnecessary to rely on his alternative reasoning that even if De Michele had misrepresented herself to Bermas that she was acting for Shapiro, such conduct would not be of such a serious nature so as to remove it from the protection of the Act.

[3] We find that a narrow cease-and-desist order is appropriate because the Respondent has not been shown to have a proclivity to violate the Act or to have had a general disregard for employees' statutory rights. See *Hickmott Foods*, 242 NLRB 1357 (1972). Accordingly, we shall modify the recommended Order and substitute a new notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Harvest Communications, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.''

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Remove from its files any references to the discharge of Piera De Michele and notify her in writing that this has been done and that the Respondent will not use the evidence of this discharge against her in any way.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees or fail or refuse to reinstate them in consequence of their participation in an employee health insurance program or other protected concerted activity for the purpose of mutual aid and protection

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Piera De Michele immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

HARVEST COMMUNICATIONS, INC.

Geoffrey Dunham, Esq., for the General Counsel.
Perry S. Heidecker, Esq. and *Richard Milman, Esq. (Milman & Heidecker)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on July 19, 1995, in New York, New York. On September 29, 1994, Piera De Michele, an individual, filed a charge against Harvest Communications, Inc. (Respondent). On November 16, a complaint issued alleging that Respondent discharged its employee, De Michele, because she engaged in protected concerted activities, in violation of Section 8(a)(1) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses and the briefs filed by counsel for the General Counsel and counsel for the Respondent, I make the following

FINDINGS OF FACT

Respondent is a New York corporation engaged in the operation of a full service advertising agency. Respondent annually derives from this operation an annual gross income in excess of $500,000. Respondent, during the course of this operation annually purchases advertising services valued in excess of $50,000 from corporations in States other than the State of New York. It is admitted, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

De Michele began working for Respondent as an executive secretary on March 30, 1993.

Although there is no labor organization that represents Respondent's employees, Respondent provided its employees with health insurance. The insurance carrier was Guardian Insurance Company. Such insurance did not provide for dental coverage.

On September 1, 1994, De Michele spoke with Eunice Bellucci, Respondent's vice president, employed by Respondent as an account executive.[1] Bellucci asked De Michele to contact Lynn Bermas, Respondent's insurance broker, to obtain some insurance claim forms. At this time, Respondent's president, Ronnie Shapiro, was on vacation and Linda Cruz, Respondent's office manager, was sick.

On September 2, De Michele was engaged in casual conversation with employee Deborah Fitzgerald and Catherine Johnson, an admitted supervisory employee. De Michele recounted her conversation with Bellucci, described above. Fitzgerald told De Michele that as long as she was going to contact Bermas she might inquire about the possibility of obtaining dental coverage.

On September 6, De Michele made her first telephone contact with Bermas. Shapiro was still out of the office, on vacation. De Michele asked about the insurance forms requested by Bellucci, and then asked about the possibility of obtaining dental coverage as part of the employees overall medical plan. Bermas told De Michelle that it would be possible, but that she would have to obtain a list of 75 percent of the employees covered by the present medical plan who wanted such dental coverage. Bermas then told De Michele that she would have to get back to her with some additional information that she was unsure of at present. During this conversation De Michele did not in any way indicate that she was calling on behalf of Shapiro, nor did Bermas inquire about such representation. Following this conversation De Michele told Fitzgerald and Johnson that she had contacted Bermas, described their conversation and told them that she would get back to them when Bermas got back to her.

Several days later De Michele spoke to Bermas and was informed that in addition to the 75-percent requirement, Respondent would have to contribute some unspecified amount of the additional cost for such dental coverage. De Michele asked Bermas if she would get back to her with a ''quoted'' amount and Bermas agreed to do so.

Thereafter, De Michele and Fitzgerald spoke to the employees on an individual basis, told them of the requirements for dental coverage, and compiled a list of the required 75-percent employee compliment. De Michele typed the names of the employees who wanted the dental coverage and left it on Cruz' desk to be faxed over to Bermas. Cruz had returned to work by this time, but Shapiro was still on vacation. Cruz was aware of the solicitation conducted by De Michele and Fitzgerald. Later that day De Michele asked Cruz whether she had faxed the list to Bermas, and Cruz responded that she had. Cruz' name was on the fax.[2]

On or about September 20, Bermas had prepared the ''quotation,'' but was unable to fax it because of a problem in the fax transmission. Bermas then telephoned Respondent's office to speak to Cruz, since her name was on the above-described fax. De Michele took the call and informed Bermas that Cruz was out sick again and Shapiro was still out on vacation. Bermas told De Michele that she was having some difficulty in transmitting the requested information by fax, but she would transmit the information by overnight mail.

When De Michele received the overnight mail sent by Bermas she telephoned her to thank her. Cruz was still out, Shapiro had returned from vacation that morning. At this time Bermas told De Michele that Shapiro would have to write a letter indicating her approval of the eligible employees receiving dental coverage.

Bermas admitted that De Michele had never, in any manner represented to her that she was representing Shapiro in this matter, but that she merely assumed it because it was Cruz that sent her the fax with the list of employees interested in dental coverage.

[1] The General Counsel contends that Bellucci is a supervisor within the meaning of Sec. 2(11) of the Act. Respondent contends that Bellucci is an employee within the meaning of Sec. 2(11) of the Act, and that her title as vice president is honorary. Since the supervisory-agent issue is not necessary for the disposition of this case, I do not decide it.

[2] Cruz was unable to recall whether she had faxed the list to Bermas. I credit De Michele. De Michele impressed me as a credible witness. She was able to recall with detail the facts of this case, notwithstanding some initial nervousness which I attribute to appearing in court and giving testimony. I was impressed with her overall demeanor. Cruz, on the other hand gave somewhat vague testimony in this and other areas. I attribute some of her vagueness to the fact that she is still presently employed and was in the presence of Shapiro when Shapiro returned from vacation, found out about De Michele's activity, and ordered De Michele's discharge as set forth below.

Following her conversation with Bermas, De Michele spoke to Fitzgerald and asked her if she would ask Shapiro to sign the letter that she had drafted. Fitzgerald agreed.

At about 3:30 p.m. Fitzgerald spoke with Shapiro and told her that a number of employees were interested in dental coverage and it would cost her no money. Shapiro said this was great. Fitzgerald then told her that she would have to sign a letter that had been prepared and send it to Bermas. Shapiro then asked Fitzgerald if someone had been speaking to Bermas. Fitzgerald told her that De Michele had spoken to Bermas. Fitzgerald testified that Shapiro became visibly angry and left the room.

Shapiro immediately called Cruz into her office. Cruz presented herself. Shapiro, visibly angry, told Cruz that Fitzgerald had given her a letter concerning employee dental plan coverage and asked her to sign it. Shapiro then asked Cruz why Bermas had given all this information out to De Michele. Cruz replied that she believed that De Michele was representing her.[3]

Shapiro then telephoned Bermas and asked her why she had given any information to De Michele concerning dental plan coverage. Bermas explained that De Michele had called asking for dental plan information and since this conversation was followed by Cruz' fax containing the list of the 75 percent employed interested in dental plan coverage, she assumed that De Michele had been authorized. I believe that Bermas would have supplied such information to any employee who called, but testified to an assumption of such authorization only because of Shapiro's anger at her giving De Michele such information coupled with her fear of losing Shapiro's business. Immediately following this conversation, Shapiro ordered Cruz to notify De Michele that she was terminated.

At about 5 p.m., before Cruz spoke to De Michele, Shapiro summoned De Michele to her office. Shapiro accused De Michele of calling the insurance company without obtaining her permission, and stated that she found such conduct ''very offensive.'' De Michele explained that Shapiro was out of town and that she had been asked to call the insurance agent on another matter by another employee. Shapiro then abruptly left her office. A few minutes later Cruz told De Michele that she was terminated.

There was no Respondent rule or anything similar which in any way prohibited employees from contacting the insurance broker concerning the employees' present health coverage or any additional coverage.

Analysis and Conclusions

Section 7 of the Act guarantees to employees the right to engage in concerted activities for their mutual aid and protection. An employee is engaged in protected concerted activity when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). The discharge of an employee for engaging in protected concerted activity is a violation of Section 8(a)(1) of the Act. *Rinke Pontiac Co.*, 216 NLRB 239, 241, 242 (1975).

The credible facts establish that De Michele acted in concert with other employees. Her initial call to Bermas resulted because she and Fitzgerald were interested in obtaining dental coverage, and in furtherance of such interest Fitzgerald made the suggestion to De Michele that she call Bermas. Thereafter, other employees became interested in dental coverage as De Michele, pursuant to Bermas' instructions, began soliciting the employees to see if there were 75 percent of Respondent's employee compliment interested in such coverage. Her subsequent contacts with Bermas was activity engaged in furtherance of obtaining dental coverage for herself and other interested employees. It is clear that such activity is both protected and concerted. *Edward Blankstein, Inc.*, 245 NLRB 951, 957 (1979). Accordingly, I conclude that De Michele was engaged in protected concerted activity by her actions in furtherance of obtaining dental coverage for Respondent's employees.

It is a violation of Section 8(a)(1) of the Act for an employer to discharge an employee for engaging in protected concerted activities. *Rinke Pontiac*, supra at 241. In order to establish such violation, the General Counsel must establish that a motivating factor in the employer's unlawful action was the employee's protected concerted activities. Once such factor is established, the burden of proof shifts to the employer to establish that such action would have taken place in the absence of such protected concerted activities. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

As set forth above, I have concluded that De Michele was engaged in protected concerted activities in connection with her efforts to obtain dental coverage for herself and other employees. Based on Shapiro's admissions, it is quite clear that such activities were the sole, reason for such discharge. Shapiro testified that she was angry because De Michele had spoken to other employees about obtaining dental coverage, without her knowledge; De Michele did not speak to her initially, before engaging in activities to find out how to go about obtaining such dental coverage; and De Michele distributed such dental coverage information obtained from Bermas to Respondent's employees without Shapiro's knowledge. Shapiro further testified that she was angry that De Michele had engaged in such activities because they were ''not within the boundaries of (De Michele's) position and offensive to me.''

The discriminatory nature of the discharge is further established by the timing of the discharge, within a few hours following Shapiro's knowledge of such activity.

I conclude that the General Counsel has established a clear prima face and has established its *Wright Line* burden.

Counsel for Respondent contends that De Michele was terminated because she misrepresented to Bermas that she was authorized to contact Bermas and obtain the procedure and information necessary for the employees to obtain dental coverage, and a quote as to what it would cost. Bermas credibly testified that De Michele was her only contact with Respondent concerning dental coverage, although she received a fax from Cruz with the names of the employees interested in dental coverage. Bermas testified that she simply assumed that De Michele was authorized to represent Shapiro. There is simply no evidence that De Michele informed

[3] As set forth above in fn. 2, I found Cruz' testimony vague and at times not credible, especially when the issue was her participation in aiding De Michele concerning her efforts to obtain information from Bermas concerning dental coverage. I am certain that this conversation with Shapiro strongly and adversely affected her credibility since Shapiro left the clear impression that she would fire any one who was directly involved in contacting Bermas and obtaining information concerning dental plan coverage.

Bermas that she was calling Bermas as a representative for Shapiro. There is also no evidence that Bermas asked De Michele if she was acting as a representative for Shapiro. Moreover, Respondent had no written or oral rule which would prohibit any employee from contacting Respondent's insurance broker. Accordingly, I conclude that there is no evidence to support Respondent's contention.

Based on a consideration of all of the evidence in this case, and the contentions of the parties, I conclude that the credible evidence clearly establishes that Respondent discharged De Michele because she contacted Respondent's insurance agent in connection with obtaining dental coverage for herself and other interested employees. It is also crystal clear that De Michele's conversations with Bermas were the very essence of her protected activity, and the sole reason for her discharge. I therefore conclude that Respondent violated Section 8(a)(1) of the Act by discharging its employee, De Michele.

An employee's concerted activities are generally protected unless such employee engages in misconduct, so violent or of such a serious nature as to render the employee unfit for further service, or where such conduct is so egregious so as to remove it from the protection of the Act. *Firch Baking Co.*, 232 NLRB 772 (1977); *Consumers Powers Co.*, 282 NLRB 130, 132 (1986); *Prescot Industrial Co.*, 205 NLRB 51, 52 (1973). It is clear that even if De Michele had misrepresented to Bermas that she was representing Shapiro, such conduct would not be of such a serious nature so as to remove it from the protection of the Act. *Laminated Products*, 294 NLRB 816, 819 (1989).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging its employee, Piera De Michele, because she engaged in protected concerted activities in connection with seeking to obtain dental coverage for herself and other employees, Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent unlawfully discharged employee Piera De Michele because of her protected, concerted activity in violation of Section 8(a)(1) of the Act, I shall recommend that Respondent be ordered to offer her full and immediate reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of her unlawful discharge, by payment other of a sum of money equal to that which she normally would have earned from the date of discharge to the date of a valid offer of reinstatement. Backpay shall be computed according to the Board's policy set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Payroll and other records in possession of Respondent are to be made available to the Board, or its agents, to assist in such computation. Interest on backpay shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).[4]

I shall further recommend that Respondent be ordered to cease and desist from ''in any other manner,'' infringing upon the rights guaranteed employees in Section 7 of the Act. See *Skrl Die Casting, Inc.*, 222 NLRB 85 fn. 1 (1976).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Harvest Communications, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees or failing or refusing to reinstate them in consequence of their participation in an employee health insurance program or other protected concerted activity for the purpose of mutual aid and protection.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Piera De Michele immediate and full reinstatement to her former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole in the manner set forth in the remedy section of this decision.

(b) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records and reports, and all other records necessary to ascertain the backpay due under the terms of this Order.

(c) Post at its New York, New York facility copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[4] See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''